

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0175 CAF**

MARTHA HERNANDEZ,
Complainant

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BEFORE THE OFFICE

v.

OF

CHRYSLER GROUP, LLC,
Respondent

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Martha Hernandez (Complainant) seeks repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged defects in her 2013 Dodge Avenger. Complainant asserts that the vehicle's defects include faulty remote keyless entry, steering that "pulls to the right," and transmission issues. Chrysler Group, LLC (Respondent) argues that the vehicle is operating as designed. The hearings examiner concludes that a preponderance of the evidence does not establish the existence of a warrantable defect in Complainant's vehicle. Accordingly, Complainant is not eligible for repurchase relief under the Texas Lemon Law.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law.

The hearing on the merits in this case convened on June 13, 2014 in San Antonio, Texas, with Hearings Examiner Anne K. Perez presiding. Attorney Matthew Norris represented Complainant. Attorney Andrew Ware represented Respondent. The hearing concluded and the record closed on June 13, 2014.

II. DISCUSSION

A. Applicable Law

The manufacturer of a motor vehicle must repurchase or replace the vehicle with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

of the alleged defect or nonconformity to the manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁴ A rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty if the defect creating a serious safety hazard continues to exist after being subject to repair two or more times and: (1) one of the repair attempts was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (2) at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁵

B. Complainant’s Evidence and Arguments

Complainant purchased a new 2013 Dodge Avenger (the vehicle) from North Star Dodge Chrysler Jeep (North Star) of San Antonio, Texas on May 29, 2013, with mileage of fourteen (14) at the time of delivery.⁶ Respondent, the manufacturer, issued a limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for 36 months or 36,000 miles, whichever comes first. Respondent also issued a powertrain warranty covering defects in the vehicle’s engine, transmission, and drive train for 60 months or 100,000 miles, whichever comes first.⁷ On the date of hearing the vehicle’s mileage was 16,956, and both types of warranty coverage remained in place.

Complainant testified that her new vehicle began exhibiting problems within three days of purchase. One of the issues is hesitation on acceleration, particularly from a stationary position. For example, if she stops the car at a red traffic signal and subsequently accelerates she can feel the transmission “jerking” and the engine losing power. The vehicle’s faulty acceleration has made her fearful of being rear-ended by another car. As a result, she characterized this issue as a safety hazard.

In addition, the transmission intermittently “jerks” when Complainant is driving in reverse gear or at high speed. Although the problem is intermittent she said it occurs several times each day. At speeds of 40 miles per hour (mph) and higher the “jerking” causes her whole car to “shake,” and it feels like the engine is about to shut down. On at least one occasion this happened while Complainant was driving on the highway. Because she felt unsafe she pulled over onto the shoulder, turned off the ignition, and

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.601(4).

⁵ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁶ Complainant Ex. 2, Buyer’s Order.

⁷ Complainant Ex. 8, 2013 Dodge Warranty Information-All Vehicles.

waited for 10 or 15 minutes. When she drove on the car seemed fine. However, following this experience she has limited her highway driving. Between the vehicle's jerking transmission, faulty acceleration, and loss of engine power she is afraid she will have an accident while accelerating up to highway speed on the access ramp, or as she attempts to pass another vehicle on the highway.

Complainant indicated that her car has several other intermittent problems. The vehicle pulls to the right, the remote keyless entry sometimes fails, and the brake pedals pulsate and make noise. Also, the brake light keeps coming on.⁸

Complainant's car has been serviced by two San Antonio dealers, North Star and Ingram Park Chrysler Jeep Dodge, Inc. (IPAC). The dealers' repair orders for the vehicle reflect the following information:⁹

Date	Mileage	Reported Concern	Diagnostic Action	Dealer's Findings
06-2-2013	1,256	Car jerks when driving on highway & also in reverse	Ck Transmission (Trans) reset pressure valves & Quick Learn Trans.	Controlled TST Trans Working OK. No Codes
07-01-2013	1,585	Car jerks in drive and sometimes in reverse. Remote keyless entry sometimes doesn't work	Test drove repeatedly. No fault codes were set or stored. Checked for any related TSB, none found. Relearned Trans. Controller & recalibrated Trans. line pressure. Keyless entry still cutting in & out	Vehicle is driving as designed. There are no modifications to reverse gear for this transmission. (Told) Customer: Remote entry takes up to 60 key on & off cycles to recognize main driver
07-15-2013	1,954	Car jerks in drive and sometimes in reverse Keyless entry doesn't always work		Opened a "Star Case"
07-24-2013	2,208	Car pulls to the right. When braking there is "slipping" in back, a	Test drove 11 miles. No work done.	Could not duplicate any of concerns

⁸ Complainant's Lemon Law Complaint form (complaint) filed with the Texas Department of Motor Vehicles (Department) on February 26, 2014, alleges the presence of three warrantable defects: "jerking" of the vehicle's transmission on the highway and in reverse gear, intermittent failure of remote keyless entry, and pulling to the right.

⁹ The repair orders were admitted as Complainants Exs. 3-7. For clarity and ease of reference, some of the information has been summarized instead of quoted.

		thump sound, and brake pedal pulsation. Key fob sometimes does not work	No code on ITECH	
04-03-2014	13,984	Brake light comes on while driving. Vehicle shakes when slowly reversing. Radio screen blacks out periodically. When driving on hwy. vehicle shudders and feels like it will shut off; customer must pull over and turn off engine for 10-15 minutes before it will run properly again.	Test drove vehicle for 40 miles	Could not duplicate any of customer's concerns

Complainant testified that her experience at both dealerships was very frustrating. On more than one occasion, she waited several weeks for a service appointment at North Star, and service technicians at both dealerships were never able to duplicate her concerns.¹⁰ Because the car has not been repaired Complainant “feels unsafe every day that I drive it.” Ultimately, on August 6, 2013, she sent written notice to Respondent that her 2013 Dodge Avenger was defective and requested its repurchase.¹¹

Domingo Ramos, Complainant’s long-time companion, testified that he was with her when she test-drove and purchased the vehicle. None of the complained-of problems were evident to either of them that day. He currently drives the car two or three times per month. He occasionally hears a “squeaking noise” coming from the brakes and has seen the brake light come on. While he has experienced both the transmission “jerking” and “hesitation” on acceleration and in reverse gear, he said these conditions are not always present so “they sneak up on you.” Mr. Ramos expressed the belief that the car’s transmission and acceleration issues do not pose a safety hazard. Still, he does not doubt that Complainant is fearful and concerned about the safety of her vehicle.

Complainant’s direct presentation also included the testimony of Matthew Norris, her legal representative in this matter. Mr. Norris testified that Complainant has agreed to pay his hourly rate of \$200, which is a reasonable rate and similar to the hourly fees charged by other attorneys practicing in the San Antonio-area. Mr. Norris indicated that he spent a total of 12 hours on the case. He billed Complainant for drafting the complaint, meeting with her, viewing the vehicle, performing legal

¹⁰ Complainant was provided with a rental vehicle each time her car was serviced.

¹¹ Complainant Ex. 1.

research, and for his preparation and appearance at hearing. Complainant requested reimbursement of attorney fees totaling \$2,400.

C. Respondent's Evidence and Arguments

Respondent argued that Complainant is not entitled to reimbursement of attorney fees under 43 Texas Administrative Code § 215.209(a)(6), which allows for recovery of attorney fees only if the complainant retains legal representation subsequent to receiving notice that the respondent is represented by counsel. Respondent noted that Mr. Norris's notice of appearance in this case was filed with the Department on April 11, 2014,¹² prior to the formal appearance of Respondent's attorney on April 30, 2014.¹³

Respondent offered the testimony of Stuart Ritchey, an automotive technical advisor employed by Respondent. Mr. Ritchey testified that he has worked in the automotive industry for 25 years. He holds multiple certifications issued by the National Institute for Automotive Service Excellence and is "master-certified" in eight categories, including both automatic and manual transmissions. In his current position, Mr. Ritchey performs vehicle diagnostic inspections for Respondent, in addition to assisting dealer service technicians with diagnostic problems. On May 16, 2014, he performed an inspection of Complainant's vehicle and prepared a report with his findings.¹⁴

Mr. Ritchey testified that his inspection of the car focused on the following issues: (1) vehicle drifts to the right; (2) remote keyless entry fob does not work at times; (3) engine jerks in drive and reverse; and (4) brake pulsations. In order to test these items, he drove Complainant's vehicle 57 miles on road surfaces including highways, residential streets, and parking lots.

With respect to the engine, Mr. Ritchey repeatedly used "hard acceleration" to bring the car's speed up to 70 mph before slowing down. In this manner, he was able to observe the transmission upshifting and downshifting. He testified that throughout these drills he did not observe the transmission "jerking" or any loss of engine power on acceleration.

¹² Respondent Ex. 1.

¹³ Respondent Ex. 2.

¹⁴ Respondent Ex. 3.

Mr. Ritchey said he tested the car's remote keyless entry in three different parking lots, two of them located near structures (a shopping mall and an Air Force base) where high radio-frequency interference can result in the type of malfunction described by Complainant. In each parking lot he circled the vehicle completely, locking and unlocking the doors from distances of 100 feet, 15 feet, and one foot away. He testified that the remote keyless entry fob did not exhibit any failures during testing.

Mr. Ritchey tested the vehicle's brakes and transmission with "stop" and "go" maneuvers. He repeatedly drove forward and backwards approximately 40 feet before stopping. He stated that throughout these exercises, he never experienced the transmission "jerking," or any brake pulsation. Also, while he did not observe the vehicle pulling to the right on any road surface, he noted that all four tires were overinflated (ranging between 39-41 pounds) when tire pressure should be 32 pounds. He further testified that the vehicle's alignment readings were slightly off.

Mr. Ritchey also performed computer diagnostic testing of the vehicle to check for "failure" or "fault" codes. He explained that there are three types of codes: (1) a "stored" code indicates that a problem was detected but fixed; (2) an "active" code signifies the presence of a problem throughout three "trips" (ignition cycles); and (3) a "pending" code (depending on the component involved) indicates that a problem was detected but not through a sufficient number of trips to become "active." According to Mr. Ritchey, the 2013 Dodge Avenger's electronic transmission would "throw a fault code" if a problem, such as a leaking transmission, was detected. However, the diagnostic testing he performed on Complainant's vehicle showed no failure codes of any kind.¹⁵

On the hearing date, Mr. Ritchey test-drove the vehicle for nine miles accompanied by Complainant, the hearings examiner, and counsel for both parties. While traveling in reverse gear at very low speed (*e.g.*, 10 mph), the car exhibited a slight "shaking." Complainant identified this movement as one of her concerns, and said the vehicle's transmission "jerks" in similar fashion when she is backing out of her driveway at home. According to Mr. Ritchey, however, this phenomena is normal and expected. He explained that when a Dodge vehicle equipped with an electronic engine is traveling at very low speed in reverse gear, the extra load on the engine heightens transmission pressure and causes the torque converter to "slip." He said this "slight slippage" may feel like a "surging back and forth" to the driver, but it is not indicative of a problem with the vehicle.

Mr. Ritchey testified that if the vehicle is stationary (*e.g.*, stopped at a red light) and Complainant subsequently accelerates to a very low speed, the same phenomena will be present. Again, the torque converter controls when the car's electronic transmission upshifts and downshifts. Automatic shifting at low speeds is frequent and harsh. For example, if the vehicle is traveling too slowly in second gear the transmission is designed to downshift to first gear, and each time this happens the driver will feel a

¹⁵ Respondent Ex. 3.

slight “shake.” On the hearing date, Mr. Ritchey demonstrated this scenario as he drove Complainant’s car in “stop and go” rush-hour traffic.¹⁶

Based on his inspection and testing, Mr. Ritchey concluded that Complainant’s vehicle is functioning as designed and needs no repairs. He likewise confirmed that there are no safety concerns with the car.

D. Analysis

In order to prevail in her request for repurchase relief, Complainant must show by a preponderance of the evidence that Respondent has not conformed her car to an applicable express warranty because Respondent cannot repair a defect in the vehicle. In addition, Complainant must show that the nonconformity creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Neither of these statutory elements were established by the required standard of proof.

Complainant credibly testified that on numerous occasions, she has experienced her vehicle’s transmission “jerking” when accelerating from a stationary position, and when accelerating to reach highway speed. She has observed this same “hesitation” and a seeming loss of engine power while traveling in reverse gear and at very low speed. The car’s “shaking” and anticipated loss of power frightened her and led her to believe the car was unsafe. However, Complainant’s transmission concerns were duplicated by Mr. Ritchey during the test drive at hearing. Mr. Ritchey has extensive training and experience in the field of automotive technology, and he adequately explained why the slight “jerking” or “surging” of the transmission is a normal function of the electronic engine that powers Complainant’s vehicle.

Mr. Ritchey also offered credible testimony concerning the remaining issues in the complaint.¹⁷ Although he did not personally observe Complainant’s car pulling to the right, he noted the presence of two factors that might account for the concern: all four tires were seriously overinflated and the vehicle was slightly misaligned. These issues are not warrantable defects. With respect to the remote keyless entry’s intermittent failure, he tested the fob in two locations where the possibility of radio-frequency interference was high, yet the issue did not reoccur. It therefore appears that this problem was successfully resolved.

¹⁶ Unfortunately, heavy traffic during the test drive prevented any demonstration of the vehicle upshifting and downshifting at highway speed.

¹⁷ Again, the complainant raises only three issues with the vehicle: “jerking” of transmission on the highway and in reverse gear, failure of remote keyless entry, and pulling to the right.

In summary, a preponderance of the evidence does not demonstrate that a warrantable defect in Complainant's vehicle currently exists. Rather, the evidence supports the conclusion that the vehicle is operating as designed, that no repairs are needed, and that no safety concerns are present. Lastly, the denial of Complainant's request for repurchase relief renders her ineligible for reimbursement of attorney fees.

III. FINDINGS OF FACT

1. Martha Hernandez (Complainant) purchased a new 2013 Dodge Avenger (the vehicle) from North Star Dodge Chrysler Jeep (North Star) of San Antonio, Texas on May 29, 2013, with mileage of fourteen (14) at the time of delivery.
2. The manufacturer of the vehicle, Chrysler Group, LLC (Respondent) issued a limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for 36 months or 36,000 miles, whichever comes first. Respondent also issued a powertrain warranty for the vehicle covering defects in the vehicle's engine, transmission, and drive train for 60 months or 100,000 miles, whichever comes first.
3. The vehicle's mileage on the date of hearing was 16,956.
4. At the time of hearing, the vehicle was covered by Respondent's basic limited warranty and its powertrain warranty.
5. Within a few days of purchase, Complainant noticed her vehicle's transmission intermittently "jerking" when accelerating from a stationary position and when accelerating up to highway speed. She observed this same "hesitation" and a seeming loss of engine power while traveling in reverse gear at very low speed. She also noticed that the vehicle "pulled to the right" and the remote keyless entry failed sometimes.
6. The vehicle's transmission was serviced for "jerking" or "shaking" in both drive and reverse gear by North Star on the following dates:
 - a. June 2, 2013, at 1,256 miles;
 - b. July 1, 2013, at 1,585 miles;
 - c. July 15, 2013, at 1,954 miles; and
 - d. April 3, 2014, at 13,984 miles.
7. The vehicle was serviced for intermittent remote key entry failure by either North Star or Ingram Park Chrysler Jeep Dodge, Inc. (IPAC) of San Antonio on the following dates:

- a. July 1, 2013, at 1,585 miles;
 - b. July 15, 2013, at 1,954 miles; and
 - c. July 24, 2013, at 2,208 miles.
8. The vehicle was serviced for pulling to the right by IPAC on July 24, 2013, at 2,208 miles, but service technicians were unable to duplicate Complainant's concern.
 9. Service technicians at both North Star and IPAC were unable to duplicate Complainant's transmission concerns.
 10. Service technicians at North Star duplicated Complainant's concern regarding remote keyless entry failure on July 1, 2013, at 1,585 miles, but the problem was not duplicated on two other service visits.
 11. Complainant was provided with a rental car each time her car was serviced.
 12. On August 6, 2013, Complainant provided written notice to Respondent of the alleged defects in her 2013 Dodge Avenger.
 13. On February 26, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department). Her complaint raised three issues with the vehicle: "jerking" of the transmission on the highway and in reverse gear, failure of remote keyless entry, and pulling to the right.
 14. On April 24, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
 15. On May 16, 2014, Complainant's vehicle was inspected by Stuart Ritchey, Respondent's factory representative. At the time of inspection Mr. Ritchey was unable to duplicate Complainant's concerns related to the transmission, the remote keyless entry, or the vehicle pulling to the right.
 16. The hearing convened on June 13, 2014 in San Antonio, Texas, with Hearings Examiner Anne K. Perez presiding. Attorney Matthew Norris represented Complainant. Attorney Andrew Ware represented Respondent. The hearing concluded and the record closed that same day.

17. On the hearing date, Complainant's transmission concerns were duplicated by Mr. Ritchey during a test drive of the vehicle. The slight "jerking" of the transmission at very low speeds and in reverse gear is a normal function of the car's electronic engine and torque converter, which automatically upshifts and downshifts in response to the driver's acceleration pattern. This slight "surging back and forth" is more prominent when the vehicle is traveling at low speed and in reverse gear because the extra load on the engine heightens transmission pressure. Also, automatic shifting at lower speeds is frequent and harsh.
18. Complainant's vehicle is not currently pulling to the right. If this issue recurs it may be due to overinflated tires or the vehicle's slight misalignment. Tire over-inflation and vehicle misalignment are not warrantable defects.
19. The vehicle's remote keyless entry fob is currently working as designed.

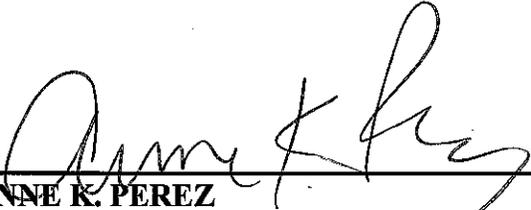
IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
6. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.
7. Because Complainant's vehicle does not qualify for replacement or repurchase, Complainant is not entitled to reimbursement of attorney's fees. 43 Tex. Admin. Code § 215.209(a)(6).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

SIGNED July 17, 2014.



ANNE K. PEREZ
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES